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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 296

PETER M. ANSELMO,

Petitioner,

vs.

THE STATE OF CONNECTICUT (REPRESENTED BY WILLIAM J. COX, HIGHWAY COMMISSIONER),

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

Your petitioner, Peter M. Anselmo, a citizen of Connecticut, hereby respectfully petitions for review upon writ of certiorari, of a decision and judgment of the Supreme Court of Errors of Connecticut being the court of last resort of that State, and respectfully shows:

A

Summary Statement of Matter Involved

This case challenges the power of the State of Connecticut, its judicial and highway agents including The

City of Hartford, to completely "take" in the constitutional sense the petitioner's private property right of access for three and one-half months, for a public purpose, without paying him compensation; during a time when the State of Connecticut by its said agents was exercising lawful powers over its highway system, but which resulted in completely shutting off and destroying *all* means of access to and from the petitioner's premises to the abutting street, resulting in a complete inability to use any of the abutting dominant tenement for any purpose, thus causing a direct injury to the petitioner's private property right of access, and therefore the property itself,—the injury being special and peculiar to him and differing from the general damage also suffered by him in common with the public—not only in degree but also in kind. Upon such allegations of fact and facts legally deducible therefrom, the petitioner brought this suit by a substituted complaint (R. 4) to the Superior Court for Hartford County for compensation, as guaranteed and mandated by the constitutions of Connecticut and the United States.

The State of Connecticut demurred to this complaint claiming in effect (1) that the State of Connecticut as a sovereign power could not be sued without its consent or without legislative permission and (2) that there was no "taking" of the petitioner's property in a constitutional sense (R. 5).

In ruling on this demurrer in favor of the State of Connecticut, the Superior Court for Hartford County, although recognizing established Connecticut property law that a complete destruction of an abutter's right of access to the highway is a taking of property in the constitutional sense (R. bottom of 6), held, nevertheless, that there could be no recovery under this complaint because (1) the taking, although complete, was only for a temporary period (R. 7) and because (2) there was no direct invasion or trespass to the freehold or soil of the property abutting

the street (R. 7) and because (3) the State of Connecticut could not be sued without its consent (R. 6). The court treated the action as one against the State of Connecticut, with the State as the real defendant (R. 5, 6).

The petitioner refusing to plead over, the Superior Court for Hartford County entered judgment upon the pleadings in favor of the named defendant (R. 9).

On an appeal from this judgment, assigning as errors (R. 10) the deprivation of the petitioner of his property and his right to just compensation in violation of the Constitutions of the United States and the State of Connecticut, the Supreme Court of Errors of the State of Connecticut sustained the judgment in favor of the named defendant, but treated the action as being one against the State of Connecticut with the State as the real defendant, and held that the State was not liable, in this particular case (1) because the pre-existing easement of travel the State had originally obtained in the highway was immune and not subject to the abutter's right of access; and (2) because the State had made only a temporary use of its own easement; and (3) because there was no trespass to the abutter's freehold; and (4) because no large or permanent structure had been erected on the State's easement in the highway (R. 11 to 15).

B

Questions Presented

Where a State through its agent, destroys, and materially interferes with, and cuts off, every and *all* means of access to and from the street to an abutter's property, completely preventing its use or exploitation for any purpose for several months, but with no direct trespass or invasion of the abutting freehold or soil, is this:

1. A direct injury to the right or easement of access of the abutter?

2. Is such an injury special and peculiar to the abutter and his property, differing in degree and kind from general damage also suffered by him in common with the public?

3. Is such a destruction of access and injury "a taking of property" and compensable "in the constitutional sense"?

The petitioner claims, under basic Connecticut property law and federal interpretations of "property" and "taking" in a constitutional sense, that the use of property depends on *some* reasonable means of access to it, *United States* v. *Causby,* 328 U. S. 256. If *all* access is cut off the property, the use being made of it, by the abutting owner, is destroyed or "taken" in the constitutional sense, for the period of the complete shut off of access; but if *some* reasonable access is left, he has no cause of action. The *Vincent* case, *infra,* 77 Conn. 431, 432, 438.

C

Reasons Relied On for the Allowance of the Writ

1. The questions in this case involve federal questions and interpretations under the Fourteenth Amendment of the Constitution of the United States, as well as Article First, Sections 9 and 11 of the Constitution of Connecticut (pages 17, 23, and 24 respectively of Vol. I, General Statutes of Connecticut, Revision of 1930), all guaranteeing that no person shall be deprived of his property without due process of law, and that private property shall not be taken for a public use without compensation, and that no person shall be denied the equal protection of the laws. *Chicago B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 241; *Clark* v. *Cox,* 134 Conn. 226, 228.

2. The main question is:—whether or not a total, temporary destruction of an easement, such as access, may be

the subject of a taking and compensation in a "constitutional sense", particularly in the exceptional and unusual case where *all* means of access of an abutter to the adjoining street has been completely cut off, materially interfered with, or destroyed,—so that there is a direct injury to the right or easement of access and a complete deprivation of the use of his property for any purpose—special and peculiar to the abutter in degree and kind, and different than that suffered by the general public. Federal cases have determined that such an injury and damage to an easement is a "taking" of property and compensable in a constitutional sense, *United States* v. *Causby,* 328 U. S. 256 and the *Causby* case at 758 of 60 F. S. citing Connecticut's *McKeon* case, 75 Conn., affirmed in 189 U. S. 508; and *United States* v. *Cress,* 243 U. S. 316.

The Supreme Court of Errors of Connecticut, however, in deciding this case, overlooked and disregarded the constitutional interpretation of "property" and "taking" as contained in the *Causby* case, as well as its own controlling and local decisions relative to property, access, and a complete interference or cutting off *all means of access,* even for a temporary period. Under such "unusual" circumstances, such a loss of access is a loss or "taking" of "property" in the constitutional sense even in Connecticut.

3. The petitioner has been denied the equal protection of the laws, particularly because his complaint sets up under basic Connecticut property law, the "unusual" case (*all* means of access being cut off or materially interfered with), "calling for exceptional treatment in the interest of justice and a recovery", under constitutional interpretations, (the *Kachele* case below), regardless of the elapsed time of the complete "taking" of *all* of the access, (The *Vincent* and *McKeon* cases below and the *Causby* case, *supra*). *Vincent* v. *N. Y., N. H. & H. R. Co.* 77 Conn. 431 at 434-435; *McKeon*

Muhler v. N.Y. & Harlem R.R.
197 U.S. 544 at 566 and 571.

v. *N. Y., N. H. & H. R. Co.*, 75 Conn. 343, 346-348, affirmed in 189 U. S. 508; and cited in *Stock* v. *Cox*, 125 Conn. 405 at 420, and in the *Causby case*, 60 F.S. at 758; *Kachele* v. *Bridgeport Co.*, 109 Conn. 151 at 155 to 157; *Park City Yacht Club* v. *Bridgeport*, 85 Conn. 366 at top of 372; *Taylor* v. *Cooke*, 113 Conn. 162 at top of 169; *Micone* v. *Middletown*, 110 Conn. 664 at top of 666; *Warner* v. *N. Y., N. H. & H. R. Co.*, 86 Conn. 561 at top of 564; *Stock* v. *Cox*, 125 Conn. 405 at 419 and 420.

WHEREFORE, under Section 237(b) of the Judicial Code, your petitioner respectfully prays that a writ of certiorari be issued to the Supreme Court of Errors of the State of Connecticut, to the end that this cause may be reviewed and determined by this Court, and that the judgment of the Supreme Court of Errors of the State of Connecticut be reversed, and that the case be remanded for trial on the petitioner's substituted complaint; all based on the grounds and reasons hereinbefore recited.

(S.) WILLIAM J. GALVIN, JR., *of*
Hartford, Connecticut,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of Court Below

The opinion of the Supreme Court of Errors of the State of Connecticut is reported in *Anselmo* v. *Cox,* 135 Conn. 78 (R. 11) and the opinion of the Superior Court for Hartford County is contained in the Record (R. 5).

II

Jurisdiction

The judgment (R. 16) is dated July 21, 1948. The opinion contains a recital that a question under the Federal Constitution was presented and raised by the petitioner's substituted complaint and passed upon by the court in arriving at its decision (R. 11 to 15).

Jurisdiction of this Court to entertain the petition is predicated upon Section 237(b) of the Judicial Code as amended by the act of February 13, 1925 (28 U.S.C., Section 344), "Where any . . . right . . . is specially set up or claimed . . . under the Constitution . . ."

Certainly the damage resulting from the loss of all use, profits and business for three and one-half months of a normal sized parking lot and gasoline station in the center of a moderately sized city cannot, legally, be assumed to be nominal or trivial.

III

Statement of the Case

This has already been set forth in the preceding petition under A (pp. 1 to 3).

IV

Questions Presented

This has already been set forth in the preceding petition under B and C (pp. 3-7).

V

Specifications of Error

1. The Connecticut Supreme Court of Errors (R. 11 to 15) erred in holding as a matter of law on a federal question, that the allegations of the petitioner's substituted complaint (setting forth that *all* means of access between the petitioner's premises and the abutting street had been cut off by the agents of the State of Connecticut), with its resulting legal conclusions deducible therefrom,—did not allege a complete loss of his easement of access resulting, in a practical sense, in a complete loss of "property" in a constitutional sense and a compensable injury.

2. The Connecticut court erred in holding as a matter of law on a federal question that the complaint and its deducible legal conclusions did not allege a direct injury to the petitioner's right or easement of access, special and peculiar to him, and differing in degree and kind from the general damage suffered by the public.

3. The Connecticut court erred as a matter of law on a federal question in deciding (a) that there could be no recovery under the petitioner's substituted complaint for a taking or injury of access, in a constitutional sense because the "taking," although complete, was only for a temporary period; and (b) that there could be no recovery under the substituted complaint, there being no direct trespass or invasion of the abutting freehold or soil.

4. The Connecticut court erred in sustaining the defendant's demurrer.

5. The Connecticut court erred in sustaining the judgment on demurrer, for the defendant; and holding that the damage to the petitioner was merely consequential, indirect and *damnum absque injuria;* and that the State of Connecticut was not obligated to pay for the injury and damage to the petitioner.

6. The Connecticut court erred in holding that there was no "taking" of property in the constitutional meaning of the Fourteenth Amendment of the Constitution of the United States.

7. The Connecticut court erred in holding that the petitioner had not been deprived of his property without compensation, due process, and equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States.

8. The Connecticut court erred in holding that there was no taking of property within the meaning of Article First, Section 11 of the Connecticut Constitution.

9. The Connecticut court erred in holding that the petitioner had not been denied the equal protection of the laws under the Connecticut Constitution.

10. The Connecticut court erred in holding that the petitioner was not deprived of his property without due process of law under the Connecticut Constitution.

11. The Connecticut court erred in holding that the State's easement of public travel in the abutting highway was immune and not subject to the abutter's easement of access to and from his property, and in further holding in effect that the State's originally obtained easement for public travel was the superior rather than the servient tenement for the easements of access belonging to abutters.

VI

Argument

Point 1 ("taking" of an easement)

This whole case turns on the question of whether or not the petitioner's substituted complaint states a cause of action for a "taking" in the constitutional sense—if the substituted complaint and its deducible legal conclusions so establish,—then as a matter of law it follows that compensation must be made under the guarantee and mandate of the Fourteenth Amendment of the United States Constitution. *Clark* v. *Cox,* 134 Conn. 226, 228, citing *Chicago R. Co.* case, 166 U. S. 226, 241.

Since the time of the enactment of the United States Fourteenth Amendment, due process of law requires that compensation be made or secured to the owner of private property taken for public use. A judgment of a state court is wanting in due process under United States Fourteenth Amendment, even if state legislation authorizes a taking of private property for public use without compensation being made the owner. And the prohibitions of the Fourteenth Amendment apply to all instrumentalities of the State, including its legislative, executive and judicial authorities, *Chicago R. Co.* case, *supra,* 166 U. S. 226.

There is a dividing line between public and private rights, which gives rise to a federal question, *United States* v. *Cress,* 243 U. S. 316 at 321.

A temporary or permanent "taking" of, or substantial interference with, only an easement or right appurtenant to real estate, such as access, egress and ingress, light, or air, with no trespass to the soil, when resulting in a prevention of the use and enjoyment of the premises, is a "taking" of property in the constitutional sense, requiring the payment of just compensation for the injury and dam-

age because of specific constitutional guarantees, *United States* v. *Causby*, 328 U. S. 256, a case of first impression; and see page 758 of the *Causby* case as reported in 60 F. S. citing *McKeon* v. *N. Y., N. H. & H. R. Co.*, 75 Conn. 343 at 346-348 and affirmed in 189 U. S. 508 and *Vincent* v. *N. Y., N. H. & H. R. Co.*, 77 Conn. 431 at 432, 438, 441, both cited with approval, on the point, in *Stock* v. *Cox*, 125 Conn. 405 at 420; *Park City Yacht Club* v. *City of Bridgeport*, 85 Conn. 366 at top of 372; and *Taylor* v. *Cooke*, 113 Conn. 162 at 165-169.

"It should be noted that the scope of intangible rights compensable in condemnation proceedings is being steadily broadened in decisions of the Supreme Court"; see *United States* v. *4.2 Acres*, 68 F. S. 279 at top of second column of page 291.

Under the basic local property laws of Connecticut it is only in the exceptional case and where *all* means of access are materially interfered with, affected, or cut off, that the special right of access of an abutter becomes recognizable and compensable, the *Vincent* case, supra; the *Park City Yacht Club* case, supra; the *Taylor* case, supra; *Kachele* v. *Bridgeport Co.*, 109 Conn. 151 at middle of 157; and *Micone* v. *City of Middletown*, 110 Conn. 664 at 666, 667. If an abutter loses only *some* access in Connecticut, he is merely inconvenienced, but if he loses *all* access, he has lost property and is damaged and must be recompensed. So where *all* means of access to the adjoining street are cut off or destroyed or materially interfered with, the abutter's right and property are "taken" in the constitutional sense. It is more than a consequential injury and it is compensable, and Connecticut has decided:

It is a direct injury to his right of access—one which is special and peculiar to him, differing from a general damage suffered by him in common with the public, not merely

in degree but also in kind. His right to compensation arises through constitutional prohibition. The *Park City Yacht Club* case at page 372. Of course *all* means of access must be cut off for the abutter's cause of action for an injury to access to "accrue" or become compensable in the constitutional sense. Under such unusual facts, as alleged by the petitioner, Anselmo, in his substituted complaint, his case calls for "exceptional treatment in the interest of justice," "permitting a recovery," see pages 155 to 157 of *Kachele* v. *Bridgeport Co.*, 109 Conn. 151.

The right of access under local and basic Connecticut property law is a property right appurtenant to the abutting land. It is a private and special easement to the abutter's land, superimposed over and upon the general easement of travel in the highway itself. *Newton* v. *N. Y., N. H. & H. R. Co.*, 72 Conn. 420 at bottom of 427-428; *Johnson* v. *Watertown*, 131 Conn. 84 at 92; *Tress* v. *Pivorotto*, 104 Conn. 389 at 392. "A convenient means of access to his lot (over the street) was as much a valuable property right as the lot itself," *Vincent* v. *N. Y., N. H. & H. R. Co.*, 77 Conn. 431 at top of 438, a temporary taking of access only, case, with no trespass to the freehold.

When this easement or right is so materially interfered with that the abutter has for all practical purposes totally lost his easement of light, air, or access, resulting, in a practical sense, of the loss of all use of his premises, it is then that his property is taken in the constitutional sense. The *Causby* case, *supra*, 328 U. S.; the *Kachele* v. *Bridgeport Co.* case, 109 Conn. 151 at the middle of 157. The case of *Camp Far West Irr. Dist.* v. *United States*, 68 F. S. 908 at 915-917 discusses the difference between a direct injury to an easement that results in a constitutional taking, and an indirect injury that is only consequential.

Point 2 (suing the State)

The Supreme Court of Errors of the State of Connecticut in its decision in this case (R. 11 to 13) recognized that, if there is a compensable injury or taking in the constitutional sense in this case, the State of Connecticut under constitutional interpretations is liable, can be sued without its consent, and must pay just compensation,—as guaranteed under the specific language of constitutional provisions. *McKeon* v. *N. Y., N. H. & H. R. Co.,* 75 Conn. 343 at top of 348; *Jacobs* v. *United States,* 290 U. S. 13 at 16; *Rose* v. *State* (Calif.), 123 P. 2d 505; *Anselmo* v. *Cox,* 135 Conn. 78.

Point 3 (sovereignty)

The sovereign powers of the state or the public right to interfere, cannot, without payment, validate a "taking" in the constitutional sense. Page 260 of the *Causby* case, *supra;* pages 346-348 of the *McKeon* case, *supra,* 75 Conn. 343, affirmed in 189 U. S. 508; *United States* v. *Cress, supra,* 243 U. S. 316 at 325; and *Jacobs* v. *United States,* 290 U. S. 13, 16. Sovereignty or legislation cannot abridge an abutting owner's property rights under the Fourteenth Amendment, the *McKeon* case, *supra,* where it said at page 346, "No statute however can avail to justify the taking of private property for public use without just compensation, Constitution of Connecticut, Article First, Section 11," and "all its acts were done at the command of the State . . . the police powers of a state . . . are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. The *License* cases, 5 How. 504, 583. If they are exercised by legislation which violates any right guaranteed by the national or state constitutions they are so far forth invalid. *Leisy* v. *Hardin,* 135 U. S. 100, 108; *State* v. *Conlon,* 65 Conn. 478."

Point 4 (no trespass to abutting soil)

The fact that there is no direct physical trespass or invasion of the abutting property itself, is no defense against a constitutional 'taking'' of an easement. Pages 260 and 261 of the *Causby* case, supra; top of 438 of *Vincent* case, supra, 77 Conn.; near middle of page 348 of *McKeon* case, supra, 75 Conn., affirmed in 189 U. S. 508; both cases cited in the *Stock* case, supra, 125 Conn. at 420; 35 Cal. Law Rev. 110, 111.

Point 5 (loss of use of abutting property)

One test is whether or not the abutter has lost the use of his land for any purpose;—has he lost the right to possess and exploit his land;—has his beneficial ownership been destroyed—page 262 of the *Causby* case, supra. Another test is—has there been a destruction of a right which is inseparably a part of the land—if so it is a taking of a part of the land. *United States* v. *Cress,* supra, 243 U. S. 316 at 330. Another test is—was the intrusion on the easement so immediate and direct as to limit the owner's exploitation and full enjoyment of his property, page 265 of the *Causby* case, supra; and top of page 372 of the *Park City Yacht Club* case, 85 Conn., supra. Another test is—has the servient tenement been so used or altered so as to practically destroy a privilege that the abutter had acquired in the use and enjoyment of his dominant tenement, the *Causby, Cress, McKeon, Vincent* and *Yacht Club* cases, supra.

Point 6 (access, an easement over easement of travel)

Although the public has an easement in the public highways of the skies, as well as in the streets, nevertheless the abutter has a peculiar and special private easement superimposed on and over the public's easements, the one perpendicular over the skyways and the other laterally

over the streets, page 264 of the *Causby* case, supra, and pages 427-428 of *Newton* v. *N. Y., N. H. & H. R. Co.*, supra, 72 Conn. and this private easement exists over the State's easement in the highway, in spite of the contention (R. 14) of the Connecticut court.

Point 7 (destruction of all means of access)

Of course under the federal as well as the Connecticut rule (the *McKeon* case, *supra,* 75 Conn. at middle of 348) if an abutter's easement of access is interfered with, but not completely cut off, he has no cause of action; and see,—to the same effect, *Trans. Co.* v. *Chicago,* 99 U. S. 635, where the court found that all means of access was not cut off and found that the access to Water Street was left free and open (top of page 636) and that therefore the damage was like that suffered by the general public. But if this last vestige of access were completely cut off, Connecticut's local and basic property law provides constitutional compensation for such "taking" of property, *Park City Yacht Club* case, supra, page 372; the *Vincent* and *McKeon* cases, supra; and see 39 Yale Law Journal 128 distinguishing the *Kachele* case, supra, 109 Conn. 151 at 157, where a recovery is not allowed except in the "exceptional" cases where *all* means of access is destroyed or materially interfered with.

Point 8 (total, temporary "taking")

The question and determination of whether the "taking" of the easement is for a temporary, intermittent, or permanent period, only affects the amount, type, quantity or quality of the damages awarded to the abutter; or the type of interest that vests, of record, in the taker paying for the taking, pages 267-268 of the *Causby* case, supra, particularly at 758 of 60 F.S.; the *McKeon* case, supra, 75 Conn. at top of page 347, affirmed in 189 U. S. 508; and the *Vincent* case, supra, 77 Conn. at 442-443; the rule of *Stock* v. *Cox,* 125

Conn. 405 at 420 supporting the *McKeon* and *Vincent* cases; and 35 Calif. Law Rev. 110, note 3.

Point 9 ("taking" of access vs. trespass—damages)

The petitioner's complaint is based on the principles of the *Vincent* case, supra, alleging that all of the State's acts were lawful, excepting its failure to pay for the "taking" of access. The *Vincent* case, supra, 77 Conn. at 432, 434, 442, 443; 120 A.L.R. 905n; 128 A.L.R. 785n; the damages are for a "taking" of property for a public use rather than for a trespass; 35 Calif. Law Rev. 110, 111.

Point 10 (taking of access regardless of change of grade)

Incidentally the State in this case relies on "change of grade" cases to defeat recovery. Had there been a real "change of grade" in this case, compensation could have been made under Section 1438, General Statutes of Connecticut (Revision 1930). However the petitioner does not allege a "change of grade" case; he is only claiming a "taking" of all access, 96 U. of Pa. Law Review, 256 at 264.

Conclusion

The lower courts, the courts of Connecticut, erroneously failed to distinguish between a partial cutting off or inconvenience of some access, as against a complete destruction of all access;—the former being an injury in kind and degree as suffered by the general public while the latter is a private, peculiar and special injury to a private property right, *Knothe* v. *Zinzer,* 96 Conn. 709 at middle of 713. The facts alleged in the petitioner's substituted complaint are sustainable against the State's demurrer, even under Connecticut property law. The *Kachele* case, supra, 109 Conn. 151 at middle of 157.

This case involves the complete "taking" of an easement of access, "property" in the constitutional sense, and requiring payment for a direct injury to the owner of this right of access, under the constitutional interpretations of the *Causby* case, *supra*, and it is, therefore, respectfully submitted, that this is an appropriate case for review and consideration by this Court.

Respectfully submitted,

(S.) WILLIAM J. GALVIN, JR.,
Attorney for Petitioner.

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